412 644-5754

DATE: June 11, 1996

CASE NO: 96-ERA-6

In the Matter of

OWEN McCAFFERTY,
DENNIS MALONEY,
SEAN KILBANE,
TERRY McLAUGHLIN,
SEAN McCAFFERTY, AND
ROBERT PROHASKA,
Complainants

v.

CENTERIOR ENERGY,
Respondent

Appearances:

Steven D. Bell, Esq.
Lynn Rogozinski, Esq.
For the Complainants

Mary E. O'Reilly, Esq.
David R. Lewis, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 and the regulations promulgated thereunder at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C.A. § 2011, et seq. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

This proceeding involves complaints filed on October 26, 1995 by complainants, Owen McCafferty, Dennis Maloney, Sean

Kilbane, Terry McLauglin, Sean McCafferty and Robert Prohaska, against Centerior Energy ("Centerior") alleging that Centerior discriminated against them in violation of Section 211 of the ERA[1] by barring complainants from employment at any Centerior facility, and by revoking a security clearance that had been granted to complainant, Dennis Maloney. The complaints assert that the sole basis for the adverse actions was the commencement of a proceeding by the complainants against Centerior under the Atomic Energy Act of 1954 in the United States District Court for the Northern District of Ohio.

The October 26, 1995 complaints were investigated by the District Director of the Cleveland, Ohio, regional office of the Wage and Hour Division of the United States Department of Labor. The District Director notified Centerior by letter dated January 9, 1996 that its fact finding had determined that the complainants were protected employees engaging in a protected activity within the scope of the ERA and that discrimination as defined by the ERA was a factor in the aforesaid actions taken against the complainants.

Centerior filed an appeal with the Office of Administrative Law Judges on January 16, 1996. Complainants filed a cross-appeal on January 16, 1996, requesting additional relief to that ordered by the District Director. Specifically, complainants requested back pay and benefits equivalent to their loss because of the discriminatory actions of Centerior.

A hearing was held on February 26 and 27, 1996 in Cleveland, Ohio. Post-hearing briefs were received on April 5, 1996.

FINDINGS OF FACT

Centerior Energy Corporation is the parent holding company of the Cleveland Electric Illuminating Company, The Toledo Edison Company and Centerior Service Company. Cleveland Electric Illuminating Company and Centerior Service Company are jointly licensed by the NRC as the operator of the Perry Nuclear Power Plant. The Toledo Edison Company and Centerior Service Company are jointly licensed by the NRC as the operator of the Davis-Besse Nuclear Power Station.

Complainants are insulators who are members of Local 3 of the Heat and Frost Insulators and Asbestos Workers Union in Cleveland, Ohio.

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[1] The employee provisions of the ERA were originally located at § 210 of the ERA but when the ERA was amended in 1992, the employee protection provision were redesignated as § 211.

Periodically, approximately every 18 months to two years, nuclear power plants are shut down for refueling and maintenance. During these outages, Centerior performs substantial maintenance and modification work that can not be done while the facility is operating. Nearly all of this work is performed in radiologically-restricted areas, that is, areas where there is exposure to radiation. During the fall of 1994, complainants were performing outage work at the Davis-Besse Nuclear Plant in Oak Harbor, Ohio as employees of Gem Industrial Services, a contractor at Davis-Besse. Their work included removing mirror insulation from steam generators and other components of the plant. Mirror insulators are removable panels made out of stainless steel with reflective insulation on both sides. (Tr. 19) On October 7, 1994, complainants were exposed to radioactive materials after removing a piece of the insulation. The exposure was unplanned as the area where they were working was supposed to be "clean," in that a survey of the area supposedly determined that they would not encounter radioactive materials.

The exposure by complainants to the radioactive materials prompted an investigation by the NRC. Following the investigation, the NRC issued a notice of violation to Centerior. The notice of violation asserted that Centerior did not take the steps necessary to assure compliance with the regulations requiring engineering controls to control the concentration of radioactive material in the air. Specifically, the notice stated:

> On October 7, 1994, the licensee did not perform surveys to assure compliance with 10 C.F.R. 20.1701, which requires that licensees use process or other engineering controls to control the concentration of radioactive material in air. Specifically, an evaluation of the concentration levels underneath insulation on the east once through steam generator hot leg was not performed to determine if engineering controls were required to control the concentration of radioactive material in air. (Respondent's Exhibit No. 2, enclosure 1, p. 2)

In response, Centerior accepted responsibility for the violation. (Complainant's Exhibit D, p. 2)

Complainants continued to work at the plant for another six weeks, when they were laid off because the refueling outage was completed.

Complainants filed a civil complaint against Centerior in the United States District Court for the Northern District of Ohio on August 7, 1995. Jurisdiction was asserted under the Price-Anderson Act, 42 U.S.C. § 2210. The Price-Anderson Act is

a part of the Atomic Energy Act. The complaint alleged, inter alia, that Centerior breached a duty owed to the complainants by failing to take the necessary precautions to prevent complainants' unwarranted exposure to radioactive materials when Centerior knew or should have known that the radioactive materials presented an unreasonable risk of harm to the complainants. The complaint includes multiple counts, including claims of negligence, strict liability, intentional infliction of emotional distress, and negligent infliction of emotional distress.

In September, 1995, one of the complainants, Dennis Maloney, was hired by Fishbach Power Services, Inc. ("Fishbach") to perform maintenance work at Centerior's Perry Nuclear Power Plant in Perry, Ohio. Maloney had worked at several nuclear and non-nuclear facilities owned or operated by Centerior including Perry Nuclear Powerhouse, Avon Powerhouse, East Lake Powerhouse, East 72nd Street, Astabula and Davis-Bessie. (Tr. 18) Maloney has had no discipline problems while working for Centerior. No complaints have been filed against him and no concerns were raised regarding his professionalism. (Tr. 19)

Maloney was working for Fischbach removing insulation and otherwise doing the same sort of work at Perry as he had been doing at Davis-Besse. (Tr. 34) Maloney was permitted to enter into restricted areas, which require safety clearances and certain training. (Tr. 37) He testified to meeting with a member of the radiological protection staff and submitting a suggestion on minimizing risk of exposure to radiation which was appreciated and accepted. (Tr. 40, 41) Complainant did not refuse any jobs, did not stage any protests, and did every thing he was told.

On October 16, 1995, Maloney was called from his job by the field superintendent for Fishbach and informed that his access to Perry had been revoked by Centerior. Maloney could not get a reason for the revocation until he talked to Don Timms, the plant ombudsman, during the exit process. The ombudsman asked Maloney the reason for the revocation. Maloney replied that he did not know, except that he was involved in litigation with Centerior. Timms offered to find out the reason. After making a telephone call, Timms informed Maloney that the reason was "biting the hand that feeds you." (Tr. 42) Maloney understood Timms to mean that he was out because he had filed the lawsuit. (Tr. 43)

Timms testified that he made a telephone call to Jim Featherstone, the Fishbach representative to determine why Maloney's employment was being terminated. Timms was informed by Featherstone that he had received a letter stating Maloney should be let go. (Tr. 274)

About two days later while at his union hall Maloney was shown a letter dated October 13, 1995 from Robert Schrauder,

Director, Perry Nuclear Services Department, to Richard Cline of Fishbach stating:

> Due to the fact that Centerior is currently involved in litigation with the following six individuals we cannot, at this time, allow any one of them to work at any Centerior facility. [Six complainants named] Please insure none of these individuals are currently assigned to the Perry Nuclear Power Plant. In addition, please do not assign any of them to the Perry Plant at least until this litigation is resolved. (Complainants' Exhibit B)

The Ombudsman's statement and Schrauder's letter provided the only reasons given to Maloney for being fired from Perry.

Pat Volza is the site radiation protection manager at Perry. On about the 5th or 6th of October, 1995, he was informed by a member of his staff that Maloney had requested a copy of Maloney's incoming whole body count. Whole body count is a monitoring program whereby any employee who is going to be subjected to external or deep dose radiation is required to undergo a bioassay to determine the level of radioactive material, if any, he is bringing with him. It allows for the establishment of a baseline prior to the incoming employee being exposed to radioactivity. (Tr. 150, 151) Maloney's request was considered unusual by someone on Volza's staff; it prompted the staff member to alert Volza of the request and of Maloney's involvement "in the insulator issue at the Davis-Bessie plant." (Tr. 151) Volza in turn contacted, Ron Scott, his counter part at Davis-Bessie to discuss Maloney's involvement in the insulator matter. Volza testified that Scott told him about Maloney's civil complaint against Centerior and a discussion ensued regarding whether, in light of the allegations of the complaint, Maloney would suffer emotional distress on the job or would in someway have a problem with complying with Centerior's programs and policies. (Tr. 152) Volza testified that he then contacted Schrauder to express concerns about Maloney's request for whole body count levels and the possibility Maloney might make use of such information to buttress his lawsuit, and also the concerns he had discussed with Scott regarding whether the allegations of the lawsuit meant Maloney could not comply with Centerior's programs and procedures. (Tr. 152, 168)

Schrauder subsequently instructed Fishbach to remove Maloney from employment at Perry, and to not hire for work at any Centerior facility the plaintiffs to the Davis-Bessie lawsuit. When Fishbach requested the instructions in writing, Schrauder forwarded the aforesaid October 13, 1995 letter to Richard Cline, identified as Complainant's Exhibit No. 2. (Tr. 207) Schrauder testified that he terminated Maloney's employment and barred the other complainants from working for Centerior because of

allegations in the complainants' lawsuit against Centerior. He stated that he took the complainants' word that they had been debilitated and suffered emotional distress as a result of the unplanned exposure at Davis-Bessie. (Tr. 207, 208)

Schrauder testified that he did not convey his "full rationale" in the October 13, 1995 letter because he wanted to keep the letter short, (Tr. 209) and that he only barred the complainants until the litigation was resolved because he thought that by that time they may have overcome their concern regarding the use of respirators. (Tr. 209)

Protected Activity

The initial question is whether the complainants' civil lawsuit against Centerior in the United States District Court for the Northern District of Ohio constitutes protected activity under § 211 of the ERA.

Section 211 provides:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
>
> > (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);
> >
> > (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.), if the employee has identified the alleged illegality to the employer;
> >
> > (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);
> >
> > (D) commenced, caused to be commenced or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954 as amended (42 U.S.C. § 2011 et seq.) or a proceeding for the administration or enforcement of any
> >
> > requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> >
> > (E) testified or is about to testify in any such proceeding or;

> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et seq.).

42 U.S.C. § 5851(a).

Complainants' civil complaint against Centerior asserts jurisdiction under the Price-Anderson Act, 42 U.S.C. § 2210. The complaint alleges, inter alia, that Centerior breached a duty owed to the complainants by failing to take the necessary precautions to prevent complainants' unwarranted exposure to radioactive materials, when Centerior knew or should have known that these radioactive materials presented an unreasonable risk of harm to the complainants. The Price-Anderson Act, enacted in 1957, added Section 170 to the Atomic Energy Act, 42 U.S.C. § 2210.

As complainants' civil complaint against Centerior is an action under the Atomic Energy Act, it would appear that there could be little room for argument that filing the complaint is protected activity under subsections (D) and (F) of § 211 of the ERA, that is, that the civil action constitutes a proceeding, or "any other action" under the Atomic Energy Act. Centerior, however, argues that § 211 does not mean what it says. Centerior argues that Congress only intended § 211 to protect notifications to the NRC or licensee management of safety concerns or regulatory violations, in order to protect the free flow of safety information to government regulators. In support of its construction of the statute, Centerior presents three arguments: (1) the ERA has never been applied to protect private lawsuits filed under the Atomic Energy Act; (2) the courts have found the definition of the term "proceeding" to be ambiguous and undefined, therefore the legislative history of the ERA must be considered to determine the intent of Congress; and (3) protecting private tort actions under the Atomic Energy Act would not serve the purpose for which the ERA was promulgated.

Centerior is correct that there is no history in the case law of § 211 being applied to a private action under the Atomic Energy Act. However, it is more than likely that prior to the instant case, no employer had fired an employee because of the employee's filing of a civil suit under the Atomic Energy Act.

It is a basic tenet of statutory construction that if statutory language is clear and unambiguous on its face then it must be given its plain meaning and no resort to the underlying legislative history is appropriate. Kansas & Electric Co. v. Block, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); Chevron, U.S.A. v. Natural Resources Defense

Council, 932 F.2d 985 988 (D.C.Cir. 1991), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Centerior's argument that a review of the legislative history of § 211 is necessary to interpret the meaning of the term "proceeding" because the Courts have held its meaning to be ambiguous is rejected. Centerior is correct that some courts have found ambiguity in the term. However, in every instance, the court's intent was not to narrow the definition to exclude a specific legal proceeding such as the present civil action, but to expand the definition to include activity not normally considered a proceeding or action. In Kansas & Electric Co. v. Block, supra, the Court held that the intent of Congress is reflected by an expansive reading of the term "action" to include the filing of internal complaints. Id. at 1413. The Court in Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995), interpreted the term "proceeding" and the phrase "any other action" to include raising particular concerns about safety with an employer. Id. at 931-933. In Passaic Valley Sewerage Com'rs v. United States Department of Labor, 992 F.2d 474 (3d. Cir. 1993), the Court interpreted the term proceeding as used in the whistle blower provision of the Clean Water Act to include intracorporate complaints. Id. at 478. The whistleblower provision of the Occupational Safety and Health Act, 29 U.S.C.A. § 651, which provides that "the institution of a proceeding" is protected activity, has been interpreted to cover a complaint to an employee's union, Donovan v. Diplomat Envelope Corp., 587 F.Supp. 1417 (E.D.N.Y. 1984), aff'd, 760 F.2d 253 (2d Cir. 1985), a communication with a newspaper, Donovan v. R.D. Anderson, 552 F.Supp. 249 (D.Kansas 1982), and a decision to retain counsel to represent him in rectifying what he considered to be unsafe working conditions.

Accordingly, the case law interpreting the meaning of a "proceeding" or "any other action" as used by § 211 of the ERA reveals no ambiguity about their application to a civil action under the Act. Thus, a resort to the ERA's legislative history is not appropriate. Moreover, even if its legislative history is considered there would be no reason to deviate from the plain meaning of the ERA. The complainants point out in their post-hearing brief that a review of the legislative history of the 1992 amendments to § 211 confirms that Congress intended the ERA to protect employees who file a civil suit under the Atomic Energy Act. Its legislative history provides in part:

> This provision [§ 211] adds a new section to the Energy Reorganization Act of 1974. This section offers protection to employees who believe they have been fired or discriminated against as a result of the fact they have testified, given evidence, or brought suit under

> that act or the Atomic Energy Act. Any worker who is called upon to testify or who gives information with respect to an alleged violation of the Atomic Energy Act or a related law by his employer or who files or institutes any proceeding to enforce such law against an employer may be subject to discrimination.

S.Rep.No. 848, 95th Cong., 2nd Sess. at 29-30, U.S. Code Cong. & Admin, News 198, pp. 7303, 7304. (emphasis added)

Centerior also argues that Congress could not have intended § 211 to apply to a private action under the Atomic Energy Act because "until amendments in 1988, Price-Anderson did not create any federal cause of action or Federal jurisdiction for injury relating to nuclear incidents."[2] Centerior's argument fails for two reasons. Initially, a private right of action did exist under Price Anderson prior to the enactment of the ERA in 1974. Price-Anderson was amended in 1966 to provide for a private right of action for extraordinary nuclear occurrences. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994) where the court noted that the 1988 amendments expanded the reach of 42 U.S.C. § 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any 'nuclear incident' instead of actions arising from only extraordinary nuclear occurrences. Secondly, when § 211 was amended in 1992 Congress had the opportunity to remove civil actions under the Atomic Energy Act as a protected activity. Instead, the amendments expanded the activities protected.

Centerior also argues that Congress would not have intended to protect the filling of private civil actions under the Atomic Energy Act because no purpose would be promoted thereby. However, protection of the public is one of the reasons for prohibiting an employer from discriminating against an employee because the employer was the recipient of a civil action under the Atomic Energy Act alleging a breach of duty by failing to take the necessary precautions to prevent unwarranted exposure to radioactive materials. The Court in O'Conner, discussed Price-Anderson's role in Congress' attempt to both encourage private sector involvement in the nuclear industry and simultaneously to protect the public. O'Conner, supra, 13 F.3d 1090 at 1105. See 42 U.S.C. §§ 2012, 2013.

Accordingly, it is determined that the plain language of § 211 precludes Centerior from taking retaliatory action against complainants because they filed the civil action against Centerior under the Atomic Energy Act.

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[2] Centerior's post-hearing brief p. 20.

Prima Facie Case

The requirements for establishing a prima facie case under Section 211 of the ERA were set out by the Secretary of Labor in Darty v. Zack Co. of Chicago, Case No. 82-ERA-2, Secretary of Labor, April 25, 1983, slip op. at 8. They are: (1) the complainant engaged in protected activity; (2) the complainant was subject to adverse action; and (3) that the respondent was aware of the protected activity when it took the adverse action against him. The complainant must also present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action.

As previously discussed, complainants engaged in protected activity under § 211 when they filed the civil action under the Atomic Energy Act against Centerior.

ADVERSE ACTION

Complainant, Maloney suffered an adverse action by Centerior when Schrauder instructed Fishbach to remove him from employment at Perry. The other five complainants suffered adverse actions by Centerior when Schrauder instructed Fishbach to not hire them for work at Perry. See Complainants' Exhibit B.

KNOWLEDGE OF PROTECTED ACTIVITY

Complainants must show that Centerior had knowledge of their protected activity at the time of the adverse employment action. Hassell v. Industrial Contractors, Inc., Case No. 86-CAA-7, Secretary of Labor, February 13, 1989. That Centerior had such knowledge is undisputed.

Volza testified that he was alerted to complainants' lawsuit against Centerior on about the 5th or 6th of October, 1995, and that it prompted him to contact Schrauder to express his concerns that the allegations of the law suit indicated that Maloney could not comply with the Centerior's programs and procedures. Schrauder took the action terminating Maloney's employment and barring the other complainants from working at any Centerior facility within a few days after his conversation with Volza.

REASON FOR TERMINATION

Complainants have shown that they engaged in protected activity and that they suffered adverse action when they were subsequently fired or banned, and that Centerior knew of the protected activity when it took such actions. Complainants must, to establish a prima facie case, present evidence to raise the inference that the protected activity was the likely reason for the adverse actions. Dean Dartey v. Zach Company of Chicago, Case No. 82-ERA-2, slip op., Secretary of Labor, April 25, 1983.

Stack v. Preston Trucking Co., Case No. 86-STA-22, slip op., Secretary of Labor, February 26, 1987 and Haubold v. Grand Island Express Inc., Case No. 90-STA-10, slip op., Secretary of Labor, April 27, 1990.

The temporal proximity of the adverse actions to the protected activity is sufficient in itself to raise the inference that the protected activity was the reason for the adverse actions. The Court of Appeals in Couty v. Dole, 886 F.2d 147 (8th Cir. 1989) held that the temporal proximity of "roughly thirty days" is sufficient as a matter of law to establish an inference of retaliatory motivation. See also the Secretary's decision in Goldstein v. Ebasco Contractors Inc., Case No. 86-ERA-36, Secretary of Labor, April 7, 1992.

Also, Schrauder's October 13, 1995 letter states that the Complainants' lawsuit was the reason for Maloney's termination and the ban on the other complainants' employment.

Respondent's Reason for Termination

As the complainants have established a prima facie case, Centerior has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscrimatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981). Dartey v. Zack Company of Chicago, Case No. 82-ERA-2, Secretary of Labor, April 25 1983. Once a respondent satisfies its burden of production, the complainant then may establish that respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated respondent. Shusterman v. EBASCO Services, Inc., Case No. 87-ERA-27, Secretary of Labor, January 6, 1992.

Centerior contends that it had legitimate non-discriminatory reasons for terminating Maloney's employment and barring the other complainants from further employment at any of Centerior's facilities. Centerior stated reasons are that it was concerned that complainants would be unwilling to work without respirators, that complainants claimed to be suffering from severe and debilitating emotional distress stemming from exposures which federal regulations specifically permit and which complainants would likely again receive, and that the complainants might therefore seek to pick and choose the work they would perform, and that this could disrupt the busy outage schedule. Centerior's argument relies solely on the averments of the complaint in complainants' civil action. The argument assumes from the averments of the complaint that the complainants'

employment at Perry would be disruptive and proceeds to offer case law showing that disruptive employees may be denied employment even if they engaged in protective activities.

Centerior attempts to argue the merits of the complainants civil case in this proceeding. The gist of Centerior's argument is that the dosage of radiation received by the complainants because of the October 7, 1994 incident was within the level approved by the NRC, therefore complainants' averments in the civil suit that they suffered injury and emotional distress compel the conclusion that complainants in the future may suffer emotional distress, refuse to wear a respirator or insist on a change of job even though the potential radiation dosage to which they will be subjected is within NRC approved limits. For example, Centerior argues that "Centerior cannot hire individuals who appear unwilling to accept the NRC's regulations, the radiation philosophy underlying those regulations, or Centerior's radiation protection program. Centerior is required to implement its program in accordance with NRC requirements and has no leeway to violate those requirements in order to accommodate an employee's personal views and preferences."[3]

Centerior has not produced any evidence to support its contentions. Each of the complainants continued to work at the Davis-Bessie plant after the October 7, 1994 incident until early December when their work was completed and they were laid off. Nothing that could be considered disruptive occurred. No complaints were brought to the attention of their union. (Tr. 112) Their supervisor complimented them on doing a good job and told them they were welcome to return to work on future outages. (Tr. 28, 29) Maloney worked without incident at Perry until his job was terminated. Volza agreed that nothing in Maloney's behavior indicated any emotional problems that would effect his work. (Tr. 172) Neither Volza nor Schrauder interviewed complainants, or in any other way attempted to determine if their past behavior was disruptive or predictive of disruptive behavior in the future. Volza contacted Scott, his counterpart at Davis-Bessie plant, to discuss Maloney's status as a plaintiff in the civil complaint. Volza testified that Scott told him about Maloney's civil complaint against Centerior and a discussion ensued regarding whether, in light of the allegations of the complaint, Maloney would in someway have a problem with complying with Centerior's programs and policies. (Tr. 152) However, Volza did not discuss with Scott, Maloney's actual understanding of and willingness to abide by Centerior's respirator policy. (Tr. 154)

To support its argument that the actions of Centerior toward the complainants were made dispassionately, Centerior asserts in

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[3] Centerior's post-hearing brief, p. 26.

its brief that the record shows not one whit of evidence of hostility towards the complainants. Centerior overlooks the reason given by the plant ombudsman to Maloney for his discharge, and the testimony of Schrauder on his reason for terminating Maloney's employment. The ombudsman told Maloney that he was out because he was "biting the hand that feeds you." (Tr. 42) Schrauder was asked on direct examination why he didn't interview Maloney before having his employment terminated. Schrauder answered:

> Q. Why didn't you seek for example to interview Mr. Maloney [one of the complainants]?
>
> A. I didn't feel I had a need to. I read the complaint and I thought the complaint was clear enough that someone that needed 30 million dollars to compensate for a low level of radiation and that they had debilitating and emotional stress over that I didn't think I needed that kind of person working the outage for me. (Tr. 209-210)

The dosage level of radiation received by the complainants on October 16, 1995 is not relevant to this proceeding, nor is the extent of injury caused thereby. Nevertheless, Centerior argues that the dosage level of radiation received by the complainants and the complainants' resulting request for damages for emotional distress is a predictor that the complainants will claim future emotional problems and is therefore a legitimate basis for the firing. Centerior's argument shows a lack of understanding or concern for the basis of complainants' lawsuit. Maloney testified generally to his reaction to the October 16, 1995 radiation incident. His emotional distress did not result from knowledge of the level of the radiation but the total circumstance surrounding the incident. Maloney was asked how he first knew he was the subject of an unplanned exposure to radioactivity. Maloney responded that at the completion of their shift, when they left their worksite, undressed and approached the portable monitors, they set them off without even being around them. "All the monitors were going off and the RP's and the HP's...came running down to the area where we exit and they made us shower several times, clean out our noses. They took masks. They had high count ratings on everything." Maloney testified that they continued to set off alarms for approximately a month. When complainants arrived at the plant they showed a slip of paper which permitted them to enter and exit the plant without going through the monitors because they would set them off before they got to them. At the end of the shift, complainants left earlier than the other workers so they wouldn't jam up their fellow employees passing through the monitors. "We couldn't go within a couple of feet of them without setting those monitors off." (Tr. 93)

Maloney was asked:

> Q. And in your complaint when you say that you've had emotional distress does the fact that you set off every alarm in the plant for a month after the incident have anything to do with your emotional distress.
>
> A. Yes, that's where the emotional distress is. I mean it goes to bed with you at night. You think of your family. You think of everything that it could possibly could be doing inside of you no matter what they tell you. You don't know. Especially if you're setting monitors off before you even walk in them, that's not something they teach in those classes. (Tr. 93)

If Centerior's argument is found to prevail in this case, and Maloney's firing is found to result not from his filing of the civil action, but from a legitimate, nondiscriminatory motive because the injury Maloney alleged in the civil action may be considered a predictor of future injury, and inconsistent with an "employer's legitimate demands for loyalty, cooperation and a generally productive work environment," then all protected actions that include an allegation of injuries to the employee could no longer be protected. Mere allegations of injuries in a complaint by an employee against his employer, even if the complaint was protected by "whistleblower" statutes such as the ERA, as here, OSHA, or Title VII of the Civil Rights Act, would constitute cause for terminating the employee.

Accordingly, it is determined that the complainants have met their burden of showing that Centerior's proffered reasons for the firing of Maloney and banning of the other complainants are pretextural. They have shown by the clear preponderance of the evidence that Centerior's actions terminating Maloney and banning the other five complainants were a deliberate retaliation for their filing the civil complaint under the Atomic Energy Act.

DAMAGES

42 U.S.C. § 5851(b)(2)(B) provides that once discrimination that is prohibited by the Act is found:

> ...the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide

> compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The Court in Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983), interpreted the above-quoted section as permitting an award of reinstatement to a former job; restoration of all back pay, benefits and entitlements; compensatory damages insofar as they are thought to be appropriate; and reasonable attorney fees and costs.

REINSTATEMENT

Christopher Scarl is the business manager for the Asbestos Workers Heat and Frost Insulators Union, Local 3, of Cleveland Ohio. He testified that a refueling outage is scheduled to commence at Davis-Bessie on April 8, 1996, as soon as Perry goes back on line, and the complainants would have been eligible to work that job but for the October 13, 1995 letter barring their employment pending the outcome of their lawsuit. (Tr. 112)

If Centerior commenced the work at Davis-Bessie testified to by Scarl, or any work for which the six complainants would have been hired but for the October 13, 1995 letter barring their employment, the six complainants shall be immediately hired for those insulator positions as if Centerior had never issued the ban on their employment with Centerior.

Centerior contends that Sean McCafferty is not qualified to work at Centerior's nuclear plants because he falsified a self-disclosure questionnaire by failing to disclose a prior drug test. In support of its contention, Centerior refers to November 28, 1994 letters to McCafferty and Gem Industrial stating that McCafferty is denied access to the Davis-Besse Nuclear Power Station due to falsification of a Toledo Edison Self Disclosure Questionnaire. Initially, the record does not support Centerior's argument as the aforesaid letters refer only to denial of access to Davis-Bessie, not all of Centerior's nuclear plants, or Perry. Moreover, McCafferty testified that he was eligible for reinstatement after a year from the issuance of the November 28, 1994 letter, and was told by Centerior that he would be reinstated upon the completion of a professional assessment to determine whether a treatment program is required. McCafferty has not requested the professional assessment because of Centerior's ban on his employment as a consequence of his

lawsuit under the Atomic Energy Act.

Accordingly, Sean McCafferty's eligibility to work at Centerior shall be reinstated as if the October 13, 1995 letter barring his employment had never been issued. His reinstatement shall comply with NRC requirements. If those requirements mandate a professional assessment before his reinstatement, he shall be given the opportunity to pursue the assessment.

BACK PAY

Dennis Maloney

Had Maloney's employment not been terminated on October 16, 1996, he would have been working on the outage at Perry on the day of the hearing, February 26, 1996. He was the fourth man hired out of about thirty or thirty-five. (Tr. 47) Maloney testified that work on the outage was projected to continue until April 6, 1996. (Tr. 260)

Richard Cline testified for Centerior. Cline is the site project manager for Fishbach Power Services at Perry. Cline testified to the work of insulators employed by Fishbach from copies of records submitted to the local union for payment of benefits. Cline testified that six insulators worked on site until October 30, 1995 when the number was increased to eleven. These eleven insulators worked until December 18, 1995, when they were laid off for two weeks. (Tr. 281) According to Cline, they worked a 40 hour week at straight time. (Tr. 279) Maloney testified that his wage rate was $31.48 per hour. Thus, Maloney lost ten weeks of work at $1,259.20 per week (40 X $31.48 = $1,259.20) during the period October 16, 1995 through December 22, 1995 for a total of $12,592.00.

Cline testified that the insulators were called back to work on January 2, 1996. His records show that the average insulator worked 29 straight time hours, 9 time and a half hours, and one double time hour per week. It is assumed that Maloney would have worked a full 40 hour straight time week and would have earned the overtime the average insulator earned during that period, that is, 9 time and a half hours and one double time hour per week, for a total of 55.5 hours (40 + 13.5 + 2) per week.[4] There were six weeks during the period January 2 through February 11, 1996. Thus, Maloney lost 333 hours of work at $31.48 per hour, or $10,482.84 from January 2 through February 11, 1996.

Cline projected that the insulating work would continue

[4] Maloney testified that he was available for work at all times from October 16, 1995 until the hearing. He was not on vacation or ill. (Tr. 88)

until April 6, 1996 with a steady decreasing number of insulators from a high of sixty to eighteen the last two weeks. (Tr. 281) As Maloney was the fourth hired it can reasonably be assumed that he would have been one of the last eighteen on the job. Cline testified that the work would be done on a 60 hour a week basis (40 hours of straight time and 20 hours of time and a half, or 70 hours of compensation). As there are eight weeks during the period February 11, 1996 to April 6, 1996, Maloney lost 560 hours of work (8 weeks X 70 hours) at $31.48 per hour, or $17,628.80

Accordingly Maloney lost a total of $40,703.64 ($12,592.00 + $10,482.84 + $17,628.80) because he did not work at Perry during the period October 16, 1995 through April 6, 1996.

Centerior argues that Maloney should not recover the full union wage of 31.48 per hour because he would not be required to make contributions for union dues, apprenticeship fund or pension. Christopher Scarl, the business manager for Local 3, testified that the union assesses a dues payment to its members of 4.9%, and an apprenticeship fund payment of $0.05 per hour. Scarl does not believe that the union assesses those payments against an award of damages; he does not know whether an assessment would be made for the pension. (Tr. 117, 118) Centerior's argument is rejected. These fees subtracted from the complainants' wages derive from arrangements between the complainants and their union for the upkeep and betterment of the union. They are paid with monies earned by the complainants. Centerior has no say in such an agreement. The purpose of a union policy to not tax damage awards should not enure to the benefit of the employer.

Maloney testified that he worked for BP Oil Company Refinery in Toledo, Ohio from October 24, 1995 until January 5, 1996 and for other employers from January 6, 1996 until the date of the hearing. His compensation during that period equaled $16,152.64 and must be subtracted from his lost earnings to determine wages lost. Also, any wages that Maloney earned between the date of the hearing and April 6, 1996 must be subtracted from the compensation lost because of not working at Perry.

Maloney testified that traveling to Toledo, Ohio to work at BP Oil resulted in additional expenses of travel of 10,500 miles at $0.30 per mile or $3,150. Maloney is entitled to reimbursement for his travel expenses. Maloney also requests compensation for the time that it took him to travel to Toledo, Ohio, 125 hours, at an hourly rate of $31.48 per hour. However, Maloney offers no rationale for such compensation. It does not compensate for a loss of earnings or opportunity for earnings. Maloney is receiving credit for working more than an eight hour work day at Perry, including a ten hour day after January 2, 1996 whereas the earnings at Perry are offset by only eight hour days at BP Oil Company. Maloney's request for compensation for the

time he took to travel to BP Oil is denied.

As additional back pay damages, Maloney is entitled to reimbursement for wages he would have earned if he would had returned to work at a Centerior plant after April 6, 1996 but for the ban on his employment.

Thus, Maloney's damages from loss of pay are:

$40,703.64
-$16,152.64
+$ 3,150.00
$27,701.00

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Five Complainants Barred From Employment

Maloney testified that if the other five complainants had not been barred from employment at Centerior, they would all have been working at Centerior on the date of the hearing. He was certain of this because his union had called in "travelers" from sister unions in other areas to work at Perry, and travelers would not be called in as long as there were local members available to work. At the time of hearing there were about 20 to 25 travelers working at Perry.

Cline testified that six insulators worked on site until October 30, 1995 when the number was increased to eleven. It is assumed that the other five complainants would have been brought on at that time. There is no way of determining from the record whether the seniority of the complainants would have enabled them to be hired on October 30 or on December 19, 1995 when an additional 19 insulators were hired. However, because "recreating the past will necessarily involve a degree of approximation and impression all doubts are to be resolved against the proven discriminator rather than the innocent employee." Woolridge v. Marlene Industries Corp., 875 F.2d 540, 546 (6th Cir. 1989). Under the same reasoning, the five complainants are considered to be among the eighteen insulators who worked until April 6, 1996. Accordingly, the five banned complainants are considered to have lost work at Perry from October 30, 1995 until April 6, 1996, minus the two weeks from December 22, 1995 to January 2, 1996 when all the insulators were laid off. Their wages are determined to be the same as Maloney, $40,703.64, minus the two weeks from October 16 to October 30, or $40,703.64 minus $2,518.40 = $38,185.24.

Robert Prohaska

Robert Prohaska's loss of wages from Perry are offset by income of $19,139.84 up to February 27, 1996 at PCI Michigan. He had expenses for living in Detroit of $3,000.00 ($250 per week for 12 weeks) that must be deducted from the offset. Prohaska's damages from loss of pay are:

$38,185.24
-$19,139.84
+$ 3,000.00
$22,O45.40

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Owen McCafferty

Owen McCafferty's loss of wages from Perry are offset by income of $20,147.20 up to February 27, 1996. McCafferty's damages from loss of pay are:

$38,185.24
-$20,147.20
$18,038.04

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Terry McLauglin

Terry McLaughlin's loss of wages from Perry are offset by income of $13,599.36 up to February 27, 1996. McLauglin's damages from loss of pay are:

$38,185.24
-$13,599.36
$24,585.88

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Sean Kilbane

Sean Kilbane's loss of wages from Perry are offset by income of $24,176.64 up to February 27, 1996. Kilbane's damages from loss of pay are:

$38,185.24
-$24,176.64

$14,008.60

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

Sean McCafferty

Sean McCafferty's loss of wages from Perry are offset by income of $6,552.00 up to February 27, 1996. McCafferty's damages from loss of pay are:

$38,185.24
-$ 6,552.00
$31,633.24

plus any wages he would have earned from Centerior after April 6, 1996 but for the ban, minus any offset for employment after April 6, 1996 (compensation minus expenses).

INTEREST

Interest is assessed on back wages in order to make whole the employees who have suffered an economic loss as a result of an employer's illegal discrimination. Interest is calculated in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. Blackburn v. Metric Constructors, Inc., 86-ERA-4, Secretary of Labor, October 30, 1991.

ATTORNEY FEES

Attorney Fees under the ERA in cases where the Administrative Law Judge issues a recommended decision on the merits finding that the respondent violated an employee protection provision are awarded to the complainant from the respondent as fees reasonably incurred. In calculating attorney fees under the statute, the Secretary employs the lodestar method, which requires multiplying the number of hours reasonably expended in pursuing the litigation by a reasonable hourly rate. See § 5851 (b)(2)(A) and (B); Gaballa v. The Atlantic Group, 94-ERA-9, Secretary of Labor Interim Order, December 7, 1995; Tinsley v. 179 South Street Venture, 89-CAA-3, Secretary of Labor Order of Remand, August, 1989.

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED THAT Respondent, Centerior Energy, be ordered to:

1. Remove denial of access flag from all records of the complainants.

2. Reinstate complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, in accord with the directives under Reassignment, at pages 15 and 16, herein.

3. Pay to the complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, back pay in accord with the directives under Back Pay, at pages 16 through 20, herein.

4. Pay to the complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621; and

5. Pay to complainants, Owen McCafferty, Dennis Maloney, Sean Kilbane, Terry McLaughlin, Sean McCafferty and Robert Prohaska, all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Thirty days is hereby allowed to complainants' counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon the respondent and complainants must accompany the application. Respondent has ten days following receipt of such application within which to file any objections.

_____
THOMAS M. BURKE
Administrative Law Judge

TMB:mr

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. The Administrative Review Board was delegated jurisdiction by Secretary Order dated April 17, 1996 to issue final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 (1996).